IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 89 OF 2005

SATYAVIJAY GOVIND RADYE ... PETITIONER

vs

CHANDRAKANT ATMARAM LAMGE & ORS.. RESPONDENTS

Mr. E. A. Sasi for petitioner

Mr. T. M. Chodankar for R-1.

CORAM:-SMT. RANJANA DESAI, J.

DATED:-24-1-2005

P.C.

The petitioner is the son of the original defendant tenant (original tenant for convenience). Respondent 1 is the original landlord-plaintiff. Respondents 2 to 6 are the heirs of the original tenant.

2. R.A.E. Suit No. 6266 of 1973 was filed by the plaintiff against the original tenant for possession of the suit premises on the ground of arrears of rent.

It appears that the suit was decreed ex parte on 7-8-1980. Notice before execution was taken out and that notice appears to have been served on the original tenant. He did not file any reply, but made the petitioner file his affidavit. The petitioner took up a stand that the suit notice was not served on the original tenant because he was all along staying in his village. He also contended that suit summons also was not served on the original tenant. His case further is that the points of defence were filed in the trial court on 1-8-1978 by one Mr. Contractor, however, Mr. Contractor has not signed the vakalatnama of the original tenant. In his affidavit the petitioner prayed that the ex parte decree be set aside.

3. The trial court by its order dated 29-4-1986 discharged the notice and set aside the ex parte decree subject to the defendant depositing the arrears in the court. The plaintiff filed a revision application challenging the said order. By order dated 1-7-88 the revision application was allowed. Rule was made absolute. The judgment and order of the trial court dated 29-4-1986 was set aside. The court ordered the execution to issue after 16-8-88.

4. The original tenant challenged this order by filing a writ petition in this court being Writ Petition No. 4018 of 1988. It was pointed out to the learned counsel for the original tenant that he was not entitled to relief in view of the statement made by the advocate who appeared before the

Small Causes Court at Bombay. Advocate Shri Wadkar, who appeared for him had not denied the fact that the suit summons as also suit notice were duly served upon the original tenant and he had filed his points of defence on 1-8-1974. The counsel for the original tenant sought permission to withdraw the petition with liberty to approach the Small Causes Court Bombay for making application for correcting statement which according to the original tenant had been wrongly recorded.

5. Pursuant to the above judgment and order notice was taken out before the Bench of the Small Causes Court. By its judgment and order dated 6-9-04. the Small Causes Court rejected the said application and hence this petition.

6. I have heard learned counsel appearing for the petitioner and the learned counsel for the respondent.

7. In order to check whether the notice was served on the original tenant or not I had called for the record from the Small Causes Court. The record has come. With the assistance of the learned counsel I have perused the record. It appears from the record that suit notice is dated 27-7-1973. It was sent to the original tenant by R.P.A.D. and under certificate of posting. The notice was served on the original tenant by R.P.A.D. and acknowledgement dated 1-8-1973 duly signed by the original tenant is on record.

8. I have seen this acknowledgement. It is signed by the original tenant. The learned counsel for the petitioner has shown me an earlier rent receipt of 1971. The signature of the original tenant on the said rent receipt is identical with the signature found on this acknowlekdgement. It is an admitted position that this notice was not replied. Thereafter suit was filed on 31-10-1973. The summons were issued on 16-2-1974. The bailiff report shows that on 16-2-74, 19-2-74 and 20-2-74 the original tenant was not found. Hence summons was served by R.P.A.D. On 5-3-74, acknowledgement was received which is signed by the original tenant. Thereafter the suit was adjourned from time to time and the original defendant did not choose to appear. However, the defences were filed by original defendant on 1-8-1974. They were signed by one advocate Mr. Contractor. They were also signed by the original tenant. The issues were framed on 7th June, 1979 and ex parte decree came to be passed on 7th August, 1980.

9. It is pertinent to note that till the affidavit in reply was filed in response to the execution notice no grievance was made at any point of time that the suit notice was not served or that summons of the suit was not served on the original tenant. It is also important to note that no application was filed for setting aside the ex parte decree and it is only in the affidavit in reply to the notice taken out by the landlord that the prayer

is made that the ex parte decree be set aside.

10. The impugned order indicates that the Bench of the Small Causes Court has seen the record and has come to a conclusion that the suit notice and the summons were duly served. I concur with the learned Judge on this. Therefore, there is no substance in the contention that advocate Shri Kantak or Shri Wadkar made any wrong statement. In fact it appears that such a statement was made because of the fact that the record clearly establishes that the suit notice and summons was served on the original tenant. In view of this, this writ petition has no substance and the same is rejected.

11. Office is directed to immediately send back the record to the Small Causes Court.

12. At this stage the learned counsel for the petitioner requests that some time may be given to the original tenant (defendant) to vacate the suit premises. In the circumstances of the case the original tenant (defendant) is given two months' time to vacate the suit premises on the original tenant (defendant) and adult members of his family and the heirs of original tenant filing the usual undertaking in this court. Undertaking to be filed within three weeks from today.

13. Needless to say that the petitioner and/or the original tenant shall deposit all the arrears in the Small Causes Court. The respondent landlord

is at liberty to withdraw the same.